



April 12, 2001

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Legal & Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2001-1464

Dear Ms. Waitt :

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145975.

The Texas Department of Insurance (the "department") received a request for:

1. All forms TX RR 100 and TX RR 102 that Legion Insurance Company filed with TDI between 1993 and 1997 . . . .
2. Any workers' compensation insurance policy or proposed policy that Legion Insurance Company has filed at TDI, including any non-standard endorsements, and any record showing TDI approval or action on those policies and endorsements.
3. Any schedule of reinsurance or other notice or correspondence to the Texas Department of Insurance from Legion Insurance Company concerning Legion Insurance Company "ceding" workers' compensation insurance risks.
4. Any public information at the Texas Department of Insurance as to whether the Commonwealth of Pennsylvania has been determined to have "substantially similar" regulation of "credit for reinsurance" of workers' compensation under Section 5.75-1, Texas Insurance Code.

You state that the department does not have information responsive to either category 1 or category 4 of the request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You

further state that you will provide information responsive to category 2 to the requestor. With respect to the information responsive to category 3 of the request, however, you claim that the information is excepted from disclosure under section 552.103 of the Government Code. You also indicate that the request for information in category 3 may implicate the proprietary rights of a third party. Consequently, you notified Legion Insurance Company ("Legion") pursuant to section 552.305 of the Government Code. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

With respect to possible proprietary information contained in the submitted information, we note that Legion has not provided this office with any arguments in support of withholding the information. Therefore, we have no basis to conclude that any of the submitted information is excepted from disclosure under section 552.110 of the Government Code. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Nonetheless, you contend that the submitted information is excepted from disclosure under Section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The primary purpose of the litigation exception is to enable governmental bodies to protect their position in litigation by requiring parties seeking relevant information to obtain it, if at all, through "discovery" processes; and that purpose may survive a previous disclosure to be applicable in prospective litigation involving the same information. *Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.--Austin 1999, no pet.). The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. To show that section 552.103 is applicable, the governmental body must demonstrate that litigation is pending or reasonably anticipated at the time of the request, and that the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* A contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

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<sup>1</sup>We note that some of the submitted information consists of a representative sample of the requested information. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You inform this office that the department is involved in two enforcement actions filed against Legion and an insurance agent. You state that both enforcement actions are currently docketed at the State Office of Administrative Hearings as numbers 454-99-3212.D and 454-01-0816.C respectively. Furthermore, you state that the requested information in category 3 relates to both cases. While you state that Legion has already had access to the information you seek to withhold, you also state that the insurance agent has not had access to the information. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the submitted information relates to pending litigation for the purposes of section 552.103.

We note, however, that the submitted documents contain information that is in the public domain by virtue of its publication. Information that is within the public domain, whether or not it relates to the pending litigation, cannot be withheld under section 552.103.<sup>2</sup> We have marked this information. We further note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the insurance agent is not excepted from disclosure under section 552.103(a), and it must be disclosed. Moreover, the applicability of section 552.103(a) ends once the litigation involving the insurance agent has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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<sup>2</sup>This information appears to be copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/er

Ref: ID# 145975

Encl: Submitted documents

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